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DOCKET NO. 86-707

IN THE SUPREME COURT
OF THE
UNITED STATES

FREDERICK G. JENSEN,
PETITIONER,

v.

COUNTY OF LANCASTER AND
NOVELLA W. ABBOTT, TREASURER,
RESPONDENT,

SUPPLEMENTAL BRIEF

In The Matter Of

A PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA
AT RICHMOND

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15 pp

QUESTION PRESENTED

1. Does a woman's constitutional right to 'elect' abortion sweep so widely as to determine the application of the common law of torts and the application of wrongful-death statutes to cases of 'wrongful pregnancy, contraception, or birth' as well as wrongful death?

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TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

United States Constitution:

Amendment IX: The ennumeration of... certain rights shall not be construed to deny (all) others retained by the people.

Docket No 86-707

IN THE SUPREME COURT OF THE UNITED STATES

Frederick G. Jensen, Petitioner,

v.

County of Lancaster and Novella W. Abbott, Treasurer,

A SUPPLEMENTAL BRIEF, in the matter of A Petition for Writ of Certiorari to the Supreme Court of Virginia at Richmond.

OPINIONS BELOW

16 October 1985: Defendant was denied his plea in Lancaster County Court upon taxes levied by Novella W. Abbott, the County Treasurer on the ground that the abortion laws of the State were illegal (Title 18.2-71 to 74.1) and because the unborn may not be deprived of life under Art. I, Sections 1 and 11 of the State's Constitution and Amendments V and IX of the Constitution of the United States. The tax was a personal property tax on a light truck at that time under a lien for a tax-claim of the Internal Revenue

Service, which was subsequently siezed and sold at auction by the I.R.S. (See, Jensen v. U.S., Docket No. 86-278 in the Supreme Court of the United States.)

10 December 1985: Upon payment of cash bond for payment of tax claim, Circuit Court 15th District at Lancaster County Courthouse refused to hear defendant's constitutional and legal objections to certain abortions as made in the court below and, ordered the taxes paid.

10 March 1986: Defendant filed in the Supreme Court of Virginia an appeal as above. Record No. 85-922.

25 April 1986: Virginia Supreme Court decides Miller v. Johnson, Rec. No. 84-1536 (Advance Sheets) upholding a right to sue in tort to recover for 'wrongful pregnancy' and 'wrongful conception', in 231 Va. 177, (1986).

5 September 1986: Virginia Supreme Court decides Modaber v. Kelley, Record No.

83-0774, (Slip notes) upholding a $750 thousand dollar judgment where a mother sustained injury due to medical malpractice that resulted in the stillbirth of her child. (See, page 9.)

17 September 1986: District Court, Lancaster County renders an oral judgment for additional taxes due on the same and identical truck, the subject of local and Federal tax action as mentioned.

20 September 1986: Virginia Supreme Court denies the appeal of defendant in Novella W. Abbott, Lancaster County Treasurer, v. Jensen, above.

FEDERAL RULES

This brief is submitted under Rule 22.6: Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases....or intervening matter not available at the time of the party's last filing.

STATEMENT OF FACTS

Upon denial of defendant's appeal it was not possible from the record to ascertain any reason for the denial, except that the Court intended to uphold the objection of Commonwealth's Attorney, C. Jeffers Schmidt, Jr., that the Court had no power to hear a law case under $500. However, the decisions the Court handed down meanwhile, as above, as this case was in process were surely fresh in its mind when it denied the appeal.

In Miller v. Johnson, above, on page 182 the court said:

> "We see no reason not to apply traditional tort principles to determine whether a cause of action exists for wrongful pregnancy or wrongful conception, where the child is reasonably healthy, both physically and mentally.
>
> "...a woman is entitled to have an abortion if she so choses, See, Roe v. Wade, 410 U.S. 113, 153-154 (1973); Code §18.2-71 to 76.2. Individuals are likewise free to practice contraception to further their constitutionally protected choice not to have

children. See Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965)."

And page 187,

"We are unwilling to hold that as a matter of law the birth of a child, even a healthy child, can never result in a tortious injury to the parents."

In Modaber v. Kelley, above the court found, page 6:

"...fetal death occurred while the infant was joined to the mother." (three weeks prematurely).

and page 5:

"...that premature separation of the placenta from the uterine wall caused death...(by) depriving the fetus of adequate oxygen." and, "Efforts to resuscitate the infant were unsuccessful."

The court concluded, page 10:

"...trial court did not err by instructing the jury that 'injury to an unborn child in the womb of the mother is to be considered as physical injury to the mother' and by permitting the jury to assess damages for injuries and mental anguish suffered by her as the result of the fetal death occuring while the infant was part of her." (Citing Miller).

The court also said, page 9:

> "She (the mother) may not be compensated for an expected loss of income of the child or for services, protection, care, or assistance expected to be provided by the child had he lived." See Code §8.01-52.

The ground for such compensation must have been Code §8.01-50, "....the death of a person...caused...by the wrongful act, neglect or default of any person...".

REASONS FOR GRANTING WRIT

While there may be some confusion about just when Baby Kelley died there is no doubt that the word the court uses to describe the unique event: It uses the word 'death'. It then decides 'death' is the basis for the recovery in tort and the failure to recover under statute. In order to make the one word 'death' have two different legal effects the court adopts the theory that death is one thing when the child is attached to the umbilical cord, but some-

thing different when separated from the mother.

It is not clear where equity lies because the court could well have been faced with a jury holding the child died under resuscitation, and had lived for a time separated from the mother. What is very clear is the court's action trying to reconcile tort and statutory recovery with its understanding of Roe, Eisenstadt, and Griswold, above. The successive holdings are giving rise to ludicrous law. How can one ask a jury to decide damages for wrongful abortion and wrongful birth? Where one sues for wrongful life the law perhaps has power to restore him 'whole', i.e., by reduction to a former state of non-existence. Ludicrous without doubt!

What seems to be no laughing matter is the legal obligation of the doctor in one case to save life and to

kill in another. One might ask, what is insurable interest, qua medicus, in a purchase of malpractice insurance? Can the unborn suffer a worse injury than destruction at the mother's option?

In property law the unborn is entitled to care and maintenance out of the estate devised to him, through his guardian ad litem. In colonial Virginia a slave in the womb was property independently devisable and not a part of the mother.

Toth v. Goree, 65 Mich. App. 296, 237 N.W. 2d 297 (1975) has a discussion of the 'Dietrich Theory', p. 305:

> "The Dietrich case announced a theory that an unborn child was part of its mother. ...The Dietrich theory resulted in a rule of recovery (in tort) limited by the viability distinction. But, the usefulness of that distinction has disappeared with the modern repudiation of the Dietrich theory."

The court also said on page 301:

"There would be an inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the same fetus under the wrongful death act.[8] (See footnote)

What can show more terrifyingly the viciousness with which the Roe Court's theory of comparative advantage tears apart the fabric of our law?

ARGUMENT

The law of this nation governs the behavior of a man toward his neighbor. Where one is injured by another our law will grant him his remedy, so as to restore him whole where possible.

Life is the most treasured thing protected by the law. It is an inalienable right. The right does not arise as a result of the state's interest, as in the mother or in the child. Neither does the right come and go upon the will of the mother or other parent, as in Roe. The sex factors of life, too, deserve a respect they are not given in

Griswold and Eisenstadt. Blackstone, Commentaries, Vol. I, p. 129 records, life begins in the contemplation of the law from the first moment that it begins to stir in the womb.

Sovereign power in a democracy remains with the people. (Constitution, Amendment IX) It is an ancient rule of law that the King can do no wrong, i.e., all government is under the law. No institution of modern law is above the law, including the Supreme Court of the United States. The common law is part of our constitutional structure, too. The Supreme Court has the power to set aside unconstitutional statutes, even abortion laws. It does not have the power to set aside the common law, which makes abortion a common law misdemeanor, great and heinous.

It is no argument to question the principle that the law protects life

by asking, "What is life?" It is not a new question. Jesus said, "Respect your neighbor", and the lawyer probed,

"Who is my neighbor?"

Life is a matter of objective fact. The law cannot restore the person killed wrongfully. Thus, it cannot hear him or give him a remedy. Neither can a court hear the unborn before he is objectively present in the womb of the mother.

Motherhood is also something objectively perceived. The woman who destroys the child in her womb is behaving unnaturally. How will we make a law that will protect the child's life in the womb against attack by its own mother or father? Or, what kind of law is it that makes of motherhood a legal concept variable at will?

The inscription above the step of the Courthouse protects the senile, comatose, sick, minors, infants at the

breast. What is the species of legal blindness we suffer when we do not see that the unborn has life, too?

The fact of life here in the United States is 1.2 million abortions each year at a rate of one abortion for two normal deliveries. While the problem is largely one of legal origin, it is not at all certain the Court's fiat will once again restore respect for life.

CONCLUSION

This case, 86-707 and, 86-278 present a twinned opportunity for the Court to declare, enjoin, and mandate due constitutional protection for the life of the unborn.